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IN THE SUPREME COURT OF THE STATE OF DELAWARE

ELIZABETH RAMSEY, Personal Representative of the Estate of DOROTHY RAMSEY, Deceased,	:	No. 305, 2017
Plaintiff -Appellant,	:	Court Below: Superior Court of the State of Delaware in and for New Castle County
v.	:	
GEORGIA SOUTHERN UNIVERSITY ADVANCED DEVELOPMENT CENTER; HOLLINGSWORTH AND VOSE COMPANY,	:	C.A. No. N14C-01-287
Defendants-Appellees.	:	

AMICI BRIEF OF COALITION FOR LITIGATION JUSTICE, INC., NATIONAL ASSOCIATION OF MANUFACTURERS, AND NFIB SMALL BUSINESS LEGAL CENTER IN SUPPORT OF DEFENDANTS-APPELLEES SEEKING AFFIRMANCE OF THE DECISION BELOW

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QUESTION PRESENTED

Whether a manufacturer who supplies asbestos or other toxic substances to an employer owes a general duty of care to persons who are exposed off-site through contact with an occupationally exposed worker or the worker's clothing.

INTEREST OF *AMICI CURIAE*

Amici curiae Coalition for Litigation Justice, Inc.,[1] National Association of Manufacturers, and NFIB Small Business Legal Center filed a brief in *Riedel v. ICI Americas Inc*., 968 A.2d 17 (Del. 2009), where the Court agreed with *amici*'s position that the employer/premises owner owed no general duty of care to the family member of a worker allegedly harmed through take home exposure to asbestos. This Court should apply the reasoning in *Riedel* and its companion, *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162 (Del. 2011), to manufacturers. Otherwise, manufacturers and their insurers could face a flood of take home exposure claims and practically limitless liability.

STATEMENT OF THE CASE

Amici adopt Appellees' Statement of the Case.

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[1] The Coalition is a nonprofit association formed by insurers in 2000. The Coalition files *amicus* briefs in cases that may have a significant impact on the asbestos litigation environment. The Coalition includes Century Indemnity Company; San Francisco Reinsurance Company; Great American Insurance Company; Nationwide Indemnity Company; Resolute Management Inc., a third-party administrator for numerous insurers; and TIG Insurance Company.

STATEMENT OF FACTS

Amici adopt Appellees' Statement of Facts to the extent relevant to the arguments in this brief.

SUMMARY OF THE ARGUMENT

In *Riedel* and *Price,* this Court held that employers/premises owners owe no general duty of care to the family members of workers exposed to asbestos through contact with occupationally exposed workers or their clothing. The analytical framework in *Riedel* and *Price* applies to manufacturers, and needs to do so for the sake of uniformity and to prevent a flood of cases against manufacturers. It would be illogical to subject manufacturers to liability for take home exposures when their connection to secondarily exposed persons is more remote than the employers/premises owner defendants in *Riedel* and *Price*. Further, manufacturers lack an effective means to carry out the proposed duty.

For these reasons, the Court should affirm the decision below.

ARGUMENT

I. THE *RIEDEL* AND *PRICE* MISFEASANCE/ NONFEASANCE ANALYTICAL FRAMEWORK APPLIES

Delaware courts look to the Restatement (Second) of Torts (1965) to determine the existence of a duty between the parties.[2] According to Restatement (Second) § 284, negligent conduct involves either (1) "an act which the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another," (commonly described as misfeasance), or (2) "a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do" (commonly described as nonfeasance).

As explained in *Price*, "[i]n the case of misfeasance, the party who 'does an affirmative act' owes a general duty to others 'to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the [affirmative] act.'" 26 A.3d at 167 (quoting Restatement (Second) of Torts § 302 cmt. *a* (1965)). In the case of nonfeasance, "the party who 'merely omits to act' owes no general duty to others *unless* 'there is a special relation between the actor and the other which gives rise to the duty.'" *Id*. (quoting Restatement (Second) of Torts § 302 cmt. *a*) (emphasis added).

[2] *See Riedel*, 968 A.2d at 21 (rejecting the "expansive approach for creating duties found in the Restatement (Third) of Torts . . . [as] simply too wide a leap for this Court to take.").

The Court in *Riedel* and *Price* determined that the conduct of the employers/premises owners was nonfeasance. *See Riedel*, 968 A.2d at 24; *Price*, 26 A.3d at 169. At bottom, plaintiffs' harm — to the extent asbestos-related and not idiopathic[3] — stemmed from defendants' alleged *failure to prevent* their workers from taking asbestos fibers home on their clothes and defendants' alleged *failure to warn* of the risk of exposure and disease.

The Court went on to find in both cases that there was no "special relationship" recognized by the Restatement (Second) between the plaintiffs and their spouse's employers that would create a general duty of care. *See Riedel*, 968 A.2d at 27; *Price*, 26 A.3d at 170.

The analytical framework in *Riedel* and *Price* applies here. The Restatement provisions cited in *Riedel* and *Price* are "concerned only with the negligent character of the actor's *conduct*," not the nature of the actor. Restatement (Second) of Torts § 302 cmt. *a*. (emphasis added). The Restatement explains that the conduct of "*anyone* who does an affirmative act" negligently is misfeasance, while nonfeasance involves "*one* who merely omits to act" in a situation where "there is

[3] *See* William L. Anderson, *The Unwarranted Basis for Today's Asbestos "Take Home" Cases*, 39 Am. J. of Trial Advoc. 107, 110 (2015) ("take-home cases being filed today are not based on changes in medical literature or the results of new scientific reasoning documenting that such cases are asbestos-induced diseases. Instead, the increase in filings of take-home cases is due to a convergence of factors unrelated to actual asbestos-produced disease….").

a special relation between the *actor* and the other which gives rise to the duty." *Id.* (emphasis added).

Here, just as in *Riedel* and *Price*, the Defendants' alleged conduct was "pure nonfeasance – nothing more." *Price*, 26 A.3d at 169. The manufacture and sale of asbestos-containing products is not misfeasance any more than the *Riedel* and *Price* defendants' purchase and utilization of asbestos in their operations. In all of these cases, the asserted harms flowed from the defendants' alleged failure to prevent or warn about the risk of off-site exposures. That is classic nonfeasance. As the Court said in *Price*, "legal characterizations cannot change the nature of the underlying conduct." 26 A.3d at 168.

Further, as in *Riedel* and *Price*, Plaintiff cannot establish a "special relationship" with the Defendants that would give rise to a duty of care. Plaintiff and Defendants are "legal strangers in the context of negligence." *Riedel*, 968 A.2d at 27-28; *see also Price*, 26 A.3d at 170. Courts in analogous cases have reached the same conclusion regarding similarly situated plaintiffs.[4]

[4] *See In re Certified Question from Fourteenth Dist. Court of Appeals of Texas (Miller v. Ford Motor Co.)*, 740 N.W.2d 206, 216 (Mich. 2007) (in asbestos take home exposure case the lack of a "'relationship between the parties' . . . strongly suggests that no duty should be imposed"); *In re New York City Asbestos Litig. (Holdampf v. A.C. & S., Inc.)*, 840 N.E.2d 115, 122 (N.Y. 2005) ("no relationship" between plaintiff and spouse's employer in asbestos take home case); *Palmer v. 999 Quebec, Inc.*, 874 N.W.2d 303, 310 (N.D. 2016) (no relationship between employer of plaintiff's father and plaintiff); *Gillen v. Boeing Co.*, 40 F. Supp. 3d

As the trial court noted, it would be illogical to subject manufacturers to liability for take home asbestos exposures when the employer with a closer relationship to the plaintiff owes no duty of care under *Riedel* and *Price*.

534, 542 (E.D. Pa. 2014) ("the lack of a relationship between Mrs. Gillen's claim and Defendant's conduct weighs heavily against this Court imposing . . . a duty").

II. IMPOSITION OF LIABILITY WOULD BE PRACTICALLY LIMITLESS FOR MANUFACTURERS

Duty principles are found in the law of negligence "as a means by which the defendant's responsibility may be limited" to avoid imposing upon the defendant "an obligation to behave properly" that is "owed to all the world." *In re Asbestos Litig. (Lillian Riedel)*, 2007 WL 4571196, at *8 (Del. Super. Ct. Dec. 21, 2007) (quoting W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 53, at 356 (5th ed. 1984)), *aff'd sub nom. Riedel v. ICI Americas Inc.*, 968 A.2d 17 (Del. 2009).

Courts have recognized the practically limitless liability that would result if defendants — whether employers/premises owners or manufacturers — are held to owe a general duty of care to persons exposed off-site to asbestos or other toxic substances from contact with occupationally exposed workers and their clothing. As Judge Slights explained in granting summary judgment for the defendant in *Riedel*,

> [T]here is no principled basis in the law upon which to distinguish the claim of a spouse or other household member who has been exposed to asbestos while laundering a family member's clothing, from the claim of a house keeper or laundry mat operator who is exposed while laundering the clothing, or a co-worker/car pool passenger who is exposed during rides home from work, or the bus driver or passenger who is exposed during the daily commute home, or the neighbor who is exposed while visiting with the employee before he changes out of his work clothing at the end of the day. All have been exposed to asbestos from the employee's clothing; all arguably have intersected

> with the asbestos-covered employee in a foreseeable manner; and all would have viable claims of negligence . . . if the take home exposure cause of action is permitted. . . . The burden upon the defendant to undertake to warn or otherwise protect every potentially foreseeable victim of off-premises exposure to asbestos is simply too great; the exposure to potential liability would be practically limitless.

In re Asbestos Litig. (Lillian Riedel), 2007 WL 4571196, at *12.

Many other courts have expressed the same concerns in analogous settings. *See Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 699 (Iowa 2009) (a general duty to prevent take home asbestos exposure would arguably extend "to a large universe" of plaintiffs such as taxicab drivers and employees of grocery stores, dry-cleaners, convenience stores, and laundromats); *In re New York City Asbestos Litig. (Holdampf v. A.C. & S., Inc.)*, 840 N.E.2d 115, 122 (N.Y. 2005) (take home exposure liability would generate claims from remote persons such as babysitters or employees of laundries); *In re Certified Question from Fourteenth Dist. Court of Appeals of Texas (Miller v. Ford Motor Co.)*, 740 N.W.2d 206, 217 (Mich. 2007) ("no duty should be imposed because protecting every person with whom a business's employees and the employees of its independent contractors come into contact, or even with whom their clothes come into contact, would impose an extraordinarily onerous and unworkable burden"); *CSX Transp., Inc. v. Williams*, 608 S.E.2d 208, 209 (Ga. 2005) (take home exposure duty would "create an almost infinite universe of potential plaintiffs") (quoting *Widera v. Ettco Wire & Cable Corp.*, 611 N.Y.S.2d 569, 571 (N.Y. App. 2d Dep't 1994)); *Adams v.*

Owens-Illinois, Inc., 705 A.2d 58, 66 (Md. Ct. Spec. App. 1998) (potential plaintiffs might include "other family members, automobile passengers, passengers, and co-workers").

Moreover, the "specter of limitless liability," *Gillen v. Boeing Co.*, 40 F. Supp. 3d 534, 542 (E.D. Pa. 2014), would stretch decades into the future. The influx of asbestos claims shows no signs of abating, even though the asbestos litigation is in its fourth decade. A 2016 review of asbestos-related liabilities reported to the U.S. Securities and Exchange Commission by more than 150 publicly traded companies found that "[f]ilings remained flat at the levels observed since 2007…." Mary Elizabeth Stern & Lucy P. Allen, *Resolution Values Dropped 35% While Filings and Indemnity Payments Continued at Historical Levels*, at 1 (NERA Econ. Consulting June 2016); *see also* Jenni Biggs et al., *A Synthesis of Asbestos Disclosures from Form 10-Ks — Updated* 1 (Towers Watson June 2013) (mesothelioma claim filings have "remained near peak levels since 2000."). "Typical projections based on epidemiology studies assume that mesothelioma claims arising from occupational exposure to asbestos will continue for the next 35 to 50 years." Biggs et al., *supra*, at 5; *see also Best's Special Report: Asbestos Losses Continue to Rise; Environmental Losses Remain Stable* (Nov. 2017) (asbestos losses have shown no sign of subsiding).

III. MANUFACTURERS LACK AN EFFECTIVE MEANS TO CARRY OUT A GENERAL DUTY OF CARE TO REMOTE PERSONS

Another important factor weighing against imposition of liability is that manufacturers cannot effectively carry out a duty of care to remote persons.

The Georgia Supreme Court in *CertainTeed Corp. v. Fletcher*, 794 S.E.2d 641, 645 (Ga. 2016), noted this problem in rejecting a failure to warn claim in a take home exposure case brought by the daughter of an occupationally exposed worker against a manufacturer of asbestos-laden water pipes. The court said it would be "unreasonable to impose a duty on [the manufacturer] to warn all individuals in [plaintiff's] position, whether those individuals be family members or simply members of the public who were exposed to asbestos-laden clothing, as the mechanism and scope of such warnings would be endless." *Id*. at 645. Even if a warning reached an occupationally exposed worker, the court said, the "onus would have been on the *worker* to keep those third parties safe." *Id*. And "while some workers might have taken steps to protect or warn family members or other individuals with whom they came in contact, other workers might not have taken such steps." *Id*.

Likewise, in *Neumann v. Borg-Warner Morse Tec LLC*, 168 F. Supp. 3d 1116, 1125 (N.D. Ill. 2016), *reconsideration denied*, 2016 WL 3059082 (N.D. Ill. May 31, 2016), a Chicago federal court applying Illinois law held that a supplier of asbestos-containing friction paper did not owe a duty to a plaintiff in a take home

asbestos exposure case "in light of the magnitude of the burden of protecting her and the ramifications of imposing that burden" on the defendant. The defendant pointed out that, as a manufacturer, it had no feasible means of communicating warnings or instructions to the secondarily exposed plaintiff nor could it require the occupationally exposed worker or his employer to comply with any warning or recommendations such as handling restrictions, installing showers at the worksite, or offering laundry services that might have helped prevent harm. *See id*. at 1122-23.

It would be poor public policy for the Court to recognize a duty that cannot feasibly be implemented or would have no practical effect.

CONCLUSION

For these reasons, the Court should affirm the decision below.

Respectfully submitted,

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Dated: December 15, 2017

CERTIFICATE OF SERVICE

I, Peggy L. Ableman, hereby certify that on December 15, 2017, the caused a true and correct copy of the foregoing ***AMICI*** **BRIEF OF COALITION FOR LITIGATION JUSTICE, INC., NATIONAL ASSOCIATION OF MANUFACTURERS, AND NFIB SMALL BUSINESS LEGAL CENTER IN SUPPORT OF DEFENDANTS-APPELLEES SEEKING AFFIRMANCE OF THE DECISION BELOW** to be served via File & Serve*Xpress* upon the following counsel of record:

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